



UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-0001
OFFICE OF THE DIRECTOR

September 18, 2013

Mr. Jason Smathers
233-20140456@requests.muckrock.com

Dear Mr. Smathers:

This responds to your email of September 10, 2013, regarding your request for a follow up to a previous Freedom of Information Act (FOIA) request you made. In particular, according to our records, in an undated correspondence you asked for "[a]ny and all letters from government agencies, law enforcement agencies, tax agencies or federal or state legislative offices of any type requesting personal census data, and each response from the Census Bureau to such written or oral requests." You also requested that "if appropriate, fees be waived [since] this request is in the public interest." The Census Bureau FOIA Office received your initial request on December 1, 2010, and assigned to it tracking number 11-073.

On February 15, 2011, the Department of Commerce's Office of the General Counsel (OGC) received your perfected appeal of our denial of your request for a fee waiver. By letter, dated February 23, 2011, the OGC informed you that your appeal was denied. The letter also advised you that upon payment of the \$7,468.37 fee estimate provided by our office, we would begin a search and process your request. For your convenience, a copy of this letter is enclosed.

Our office automatically closes FOIA requests after 30 days of continuous inactivity in situations such as when fee estimates are provided or clarification is requested. Since your request, number 11-073, was inactive for over 30 days after the OGC issued its final decision on your appeal, your request was closed.

Furthermore, by email, dated February 21, 2013, you made a similar request for the status of your December 2010 FOIA request, number 11-073. By email, dated March 29, 2013, we responded to you that: "According to our records, this request has been closed. Please feel free to contact us so that we can discuss this further."

Sincerely,

Michael J. Toland, Ph.D.
Freedom of Information Act Officer
Chief, Freedom of Information Act and Information Branch

Enclosure

Enclosure



UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, D.C. 20230

FEB 23 2011

Mr. Jason Smathers
requests@muckrock.com

Dear Mr. Smathers:

This responds to your Freedom of Information Act (FOIA) (5 U.S.C. § 552) appeal of the U.S. Census Bureau's (Census) fee determination concerning your FOIA request received by Census on December 1, 2010. That request asked for "[a]ny and all letters from government agencies, law enforcement agencies, tax agencies or federal or state legislative offices of any type requesting personal census data, and each response from the Census Bureau to any such written or oral requests." You also requested that, "if appropriate, fees be waived [since] this request is in the public interest." You provided that "[t]he requested documents will be made available to the general public free of charge as part of the public information service at MuckRock.com, processed by a representative of the news media/press and is made in the process of news gathering and not for commercial use."

By email dated December 7, 2010, Census requested that you clarify your request and include a date range for the records requested. On January 3, 2011, you sent an email to Census stating that your "request was very specific"; however, you agreed to limit your request to records created on or after September 11, 2001. By email dated January 26, 2011, Jill Harbison, Acting Chief, FOIA and Information Branch, Census, denied your request for a fee waiver. Census classified you as falling into the "All Other Requesters" fee category pursuant to 15 C.F.R., Part 4.11, and notified you that the estimated fee to process your FOIA request was \$7,468.37. Ms. Harbison further notified you that your request was not considered received for purposes of calculating the time limit, in Part 4.6(b) of the Department of Commerce's FOIA regulations, to respond to a request, and that Census would not consider it received, and begin to process your request until it received your payment of \$7,468.37.

By email received on February 4, 2011, you appealed Census's denial of your request for a fee waiver. Your email, however, did not contain your initial FOIA request or Census's response denying your request for a fee waiver. Our office notified you by email on February 10, 2011, that your appeal was not perfected due to your failure to include the aforementioned documents with your appeal. On February 15, 2011, our office received an email from you containing the necessary documents to perfect your FOIA appeal.

On appeal, you contend that the news media fee category is appropriate for a number of reasons. First, you assert that the information requested is of public interest because "[a]ttempts to access information believed to be confidential by government agencies is of current interest to the public." Next, you provide that you "plan to write about attempts to access personal census data [and] will be taking the records responsive to this FOIA request and turning it into a distinct work using [his] editorial skills." You clarify this point by offering that you plan to "write on the

subject, not simply post the records.” You also assert that you are a writer for the publication, Witnesses Unto Me, in which there are hundreds of previous articles which you have written and have been published by Witnesses Unto Me. You assure publication in the instant case, which coupled with your “track record of being published, demonstrate (sic) that the information will be distributed to the general public.” Finally, you assert that no fees (search or duplication) can be charged for this request because Census “failed to meet the 20 business day time limit, nor did they request an additional 10 days as allowed by the FOIA in some cases.” Citing to the 2007 FOIA amendments, you argue that “[f]ailing to meet this deadline exempts all persons from search fees and further exempts news media from any fees.”

Fee Category

In support of your argument that you qualify for the “Representative of the News Media” category under the FOIA, you assert that you are a writer for a publication called “Witnesses Unto Me.” A Google search of this publication revealed a website, www.witnessesuntome.com, which contains a myriad of blog-type entries from you. In neither your appeal nor in your FOIA request do you provide any statistical data on the reach of this publication, i.e. the number of visitors to this website. You also make no mention that the editorial work to be developed from the information requested will be published by any news outlets or publications other than the aforementioned website.

Applying these facts to the FOIA’s statutory standard, as amended by the Open Government Act, you have not established that you qualify for classification in the “Representative of the News Media” category.¹ The fact that one publishes a website, in and of itself, does not make him a representative of the news media. See Electronic Privacy Information Center v. Dept. of Defense, 241 F.Supp.2d 5, 14 n. 7 (D.D.C. 2003); see also Brown v. U.S. Patent and Trademark Office, 226 Fed. Appx. 866, 868 (11th Cir. 2007). Further, your claimed “track record of being published” is unsupported by any evidence. You provide no specifics of prior work that amounts to any example of you “gather[ing] information of potential interest to a segment of the public [and using your] editorial skills to turn the raw materials into a distinct work [which is] distribute[d] to an audience.” 5 U.S.C. § 552(a)(4)(ii). Rather, the handful of works reviewed on this publication/website are more akin to blog entries containing little, if any, analysis or editorial skills on your part. You also undercut the statement in your appeal that you plan to write about the information requested with the statement in your FOIA request that “[t]he requested

¹ The FOIA defines the term “a representative of the news media” to mean any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination. 5 U.S.C. § 552(a)(4)(ii).

documents will be made available to the general public free of charge as part of the public information service at MuckRock.com.”² Finally, you fail to articulate how your work will be viewed by an interested segment of the public. Your conclusory statement that “the information will be distributed to the general public” is insufficient to establish that your work, to be derived from the information requested, will be distributed to anyone of interest, whether it is available through the publication, Witnesses Unto Me, or posted on the repository website, MuckRock.com.

Fee Waiver

The FOIA provides for the waiver or reduction of fees if disclosure of the information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552 (a)(4)(A)(iii). Both prongs of this two-part test (the public interest prong and the commercial interest prong) must be satisfied by the requester before properly assessable fees are waived or reduced. See Brown v. U.S. Patent & Trademark Office, 445 F. Supp. 2d 1347, 1358 (M.D. Fla. 2006); S. Utah Wilderness Alliance v. U.S. Bureau of Land Mgmt., 402 F. Supp. 2d 82, 86-87 (D.D.C. 2005). Department of Commerce regulations establish how these two prongs may be satisfied pursuant to the statutory standard. See 15 C.F.R. § 4.11(k). We have reviewed the information you provided in support of your request for a fee waiver, and have determined that the Census’s decision to deny your fee waiver request was in accordance with the standards set forth in the FOIA and the Department of Commerce’s regulations, 15 C.F.R. § 4.9(c).

In order to determine whether this first prong has been met, there are four criteria which should be considered by the agency: (1) whether the subject of the requested records concerns the operations or activities of the government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether disclosure of the requested information will contribute to the public understanding; and (4) whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. 15 C.F.R. § 4.11(k)(2). It is the influence of all four factors considered together, rather than the failure or success of meeting any particular factor that is determinative. Overall, these four factors can be broken down into two broader considerations: (1) whether the information requested will contribute to a significant public understanding of a specified operation or activity of the government and (2) whether the requester has established that it has the means to and will actually disseminate the information.

You state in your appeal that “[a]ttempts to access information believed to be confidential by government agents is of current interest to the public.” You do not identify how your request relates to a particular government operation, activity, or policy. Under the FOIA, “a requester seeking a fee waiver must do more than simply assert that its request somehow relates to government operations. Judicial Watch v. U.S. Dept. of Justice, 122 F.Supp.2d 13, 17 (D.D.C. 2000); see also Judicial Watch v. U.S. Dept. of Justice, Civil Action No. 99-1234, slip op. at 9 (D.D.C. Jan 14, 2002) (stating that plaintiff must provide details specific to the request that indicate how the information sought will contribute to increasing the public’s understanding of

² In fact, a copy of your FOIA request and your subject appeal are already affixed to this website.

government operations or activities). Here, your appeal, as well as your FOIA request, fails to provide any details indicating how the information you seek will contribute to an increased public understanding of government operations or activities. In addition, from statements contained in your appeal and FOIA request, it is unclear whether you will be doing anything more than copying and putting out the records disclosed.

A member of the news media must substantiate his ability to disseminate information in order to show that he can contribute to the understanding of the public at large. See Judicial Watch, 122 F. Supp. 2d at 9-11; see also, Carney v. U.S. Dep't of Justice, 19 F. 3d 807, 814 (2d Cir. 1994). As discussed above, Census's decision to categorize you as an "All Other Requester" has been affirmed; therefore, you have the burden of proving your ability to disseminate the requested information.

Other than stating that your work is guaranteed to be published by the publication Witnesses Unto Me, you offer no clear explanation as to how the requested information will be disseminated. See Judicial Watch, 122 F. Supp. 2d at 9 (finding that the requester must have the ability to disseminate the requested information). In your FOIA request, you state that the requested documents will be made available to the public on MuckRock.com. Conversely, you state in your appeal that you will use the information to turn it into a distinct work to be published by Witnesses Unto Me. Importantly, you fail to make mention of any sort of audience (beyond the "general public") that may be interested in the information requested from Census. See Manley v. Dept. of the Navy, 2008 WL 4326448 at *7 (S.D. Ohio Sept. 22, 2008) (stating that the requester need only identify "a reasonably broad audience of interested persons, beyond himself, who are concerned and focused" on the requested materials). Because you have not offered any concrete plans on what specific information you intend to release and a description of the audience to whom you will disseminate the requested information, you have failed to show that you have the means to and will actually disseminate the requested information in a way that will contribute to the understanding of the public at large.

We have considered your appeal by applying the four factors under 15 C.F.R. § 4.11(k)(2) and determine that you fail to show that the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government. Because this request failed to meet the requirements of 15 C.F.R. § 4.11(k)(2), the public interest prong, there is no need for the Department to determine whether or not it meets the commercial interest prong at 15 C.F.R. § 4.11(k)(3).

Census's Ability to Assess and Collect Fees

Regardless of the fee waiver determination, you assert in your appeal that Census is precluded from assessing any fees in this instance (search or duplication) because Census did not meet the 20 business day time limit for processing FOIA requests. This argument fails for a number of reasons.

Most importantly, the FOIA requires requesters to follow an agency's published rules for making FOIA requests, including those pertaining to the payment of authorized fees. See Harrington v. Dept. of Justice, No. 06-0254, 2007 WL 625853, at *3 (D.D.C. Feb. 27, 2007) (citing agency's

regulations that request not deemed received “until the requester agrees in writing to pay the anticipated total fee”). Similar to the DOJ regulations cited in Harrington, the Department of Commerce’s regulations state that “the component shall not consider the request received for purposes of calculating the time limit in section 4.6(b) to respond to a request, or process it further, until the requester agrees to pay the anticipated total fee.” 15 C.F.R. § 4.11(e).³ Under Commerce’s regulations, and as Census correctly pointed out in its fee waiver determination, your FOIA request is not considered received for purposes of calculating the 20 day time limit for responding to a FOIA request since you have not paid the fee estimate assessed by Census. Therefore, the 20 day time limit argument proffered by you is inapplicable here and does not preclude Census from assessing and collecting fees from you in order to move forward in processing your request until you pay the fees in full.

Your argument that Section 552(a)(4)(A)(viii) of the FOIA precludes Census from assessing search fees because it “fail[ed] to comply with any time limit under Section 552(a)(6)” is without merit. Specifically, you base this argument on the 20 day deadline contained in § 552(a)(6)(A)(i) of the FOIA which provides that each agency “shall determine within 20 days ... after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination” As plainly stated, the 20 day time deadline for processing a FOIA request begins after the *receipt* of the request. See 5 U.S.C. § 552(a)(6)(A)(i) (emphasis added). However, the Commerce regulations unequivocally state that a FOIA request is not consider *received* for purposes of calculating the time limit for responding to or further processing a request until the FOIA requester agrees to pay the anticipated total fee or pays the full amount in advance. See 15 C.F.R. §§ 4.11(e) and 4.11i(2) (emphasis added). It is abundantly clear that you have neither agreed to pay, nor have you paid, the estimated fees for search and duplication costs. Thus, it follows that Census has not yet received the subject FOIA request for purposes of calculating the time limit for responding to your request, and is, therefore, not constricted by the 20 day time limit imposed by the FOIA to process your request.

Based on the foregoing reasons, your appeal is denied. Upon the payment of \$7,468.37 fee estimate provided by Census, Census will begin a search and process your FOIA request. This is a final decision of the Department of Commerce. You have the right to obtain judicial review of this denial of your FOIA fee waiver appeal as provided for in 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Barbara S. Fredericks
Assistant General Counsel for Administration

cc: Jill Harbison

³ The regulations also provide in section 4.11i(2) that “[i]f a component determines or estimates that a total fee to be charged under this section will be more than \$250.00, the component shall not consider the request received for purposes of calculating the time limit in Sec. 4.6(b) to respond to a request, or process it further, until it receives payment from the requester of the entire anticipated fee.” 15 U.S.C. § 4.11i(2).